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Supreme Court of the United States

October Term, 1947.

No. 449.

MARDEN & MURPHY, INC.,
Petitioner,

vs.

CITY OF LOWELL,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

P. HAROLD READY,
RAYMOND D. O'BRIEN,
Lowell, Massachusetts,
Attorneys for Respondent.

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Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported in Massachusetts advance sheets 1947, Page 927. Copy of said opinion is filed in the record on appeal of this case in this Court (R. 282).

The decision of the Land Court is found in the record herein on appeal (R. 13-45).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under U. S. C., Title 28, Section 344 (b).

Statement of the Case.

Believing that the facts in the case as stated by the petitioner do not throw sufficient light on certain characteristics of the land and buildings involved in this proceeding, the respondent herein submits the following short statement in order that this court may be afforded a clear view of the situation confronting the Assessors of Lowell.

Previous to the time of the conveyance by the petitioner to Hamilton Company in 1933 (Ex. 26; R. 70) there was remaining in the petitioner, of the original mill site owned by it and situated northerly of Jackson Street, approximately 176,417 square feet of land. After the said conveyance, which split into two parcels the remaining land of the petitioner, there then remained the land which is now Parcels 1 and 2 in this petition. On Parcel 1 stands a valuable mill building commonly known and assessed as Mill #7 (R. p. 25).

The said deed to the Hamilton Company attempted to concentrate in the land so conveyed, all the water power which had been appurtenant prior thereto, to the entire tract. However, the water system for the generation of power remained in the same location as before the conveyance. Part of this system, to wit, a water wheel in use or usable at all times (R. 25) remained in the said Mill #7 building located on Parcel 1 and also a substantial part of the raceways and wasteways for the water which turned the said wheel ran under Mill #7. The conveyance to the Hamilton Company granted it the right and easement for the use of the said raceways and wasteways but the petitioner was at all times owner of the fee in all the land comprising Parcel 1.

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Argument.

1. The Petition Should Not be Granted as to Question (a) Involving the Constitutionality of Massachusetts Statute, St. 1938, c. 478.

The provisions of Statute 1938, C. 478, to which the petitioner objects are those which require the payment of the tax or one-half thereof (approximately) in certain cases before a taxpayer may appeal to the Appellate Tax Board for a revision of the tax. Respondent submits that the right of the legislature of a state to make such a provision has been decided by this Court, and by the weight of decisions of the Highest Courts of other States.

In *Williams vs. Board of Supervisors of the County of Albany*, 21 Fed. Rep. 99, the Circuit Court for the Northern District of New York considered an Act of the New York legislature validating certain illegal assessments made upon shareholders of the National Albany Exchange Bank, and providing for the method by which the taxpayer would be granted a hearing on the tax, before the assessors, for reduction or cancellation of the assessment. That Court, in finding the act *valid*, said, at p. 101:

> "The only objection to the validating act, which seems to deserve consideration, is found in the circumstance that the tax-payers have not been given an opportunity to be heard until after they were compelled to pay their taxes . . . If, therefore, it was within the competency of the legislature to provide for the collection of a tax by a system which requires the tax-payers to pay in advance of an opportunity to be heard, but which permits them to have a subsequent hearing and to obtain restitution, if restitution ought to be made, the validating act was constitutional."

And at page 102:

> "It is asserted in many cases that notice and an opportunity for hearing of some description are matters of constitutional right; but it has nowhere been declared that it is indispensable that the hearing should be one in advance of the collection of the tax."

The above case came before this court on writ of error. *Williams vs. Supervisors of Albany,* 122 U. S. 154 (1887). This court found that there was no lack of due process of law and affirmed the judgment of the lower court. The court said at page 166:

> "Every right of the shareholder who had paid taxes on the assessment, and it does not appear that there were any others, was secured. He could present any claim he might have for a reduction or cancellation of the assessment, and be heard respecting it."

In *DePauw University vs. Brunk,* 53 Fed. 2nd 647, affirmed by 285 U. S. 527, (1932) the Court said, at p. 650:

> "So far as taxation is concerned due process of law is fully satisfied if at some stage in the proceeding the taxpayer has notice and opportunity to be heard. He may not have that opportunity until after the tax has been paid and he has brought suit to recover back, but, if he has it even then the due process provision is not violated."

In the case of *Matthew vs. Rodgers,* 284 U. S. 521 (1931) the Court denied relief by injunction to restrain the collection of a tax when a remedy existed under the laws of Mississippi whereby the taxpayer, upon payment of the tax, could maintain a suit at law for its recovery on the ground that it was exacted in violation of the Constitution of the United States. In support of this, the Court, at page 526, cited some seven of its decisions.

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That the right to collection of the tax regardless of a pending appeal by the taxpayer is permitted to the taxing authority without infringement of the rights of the taxpayer under the Constitution of the United States has long been established.

Cheatham vs. United States, 92 U. S. 85, 89 (1876).
Tennessee vs. Sneed, 96 U. S. 69, 75 (1877).
Springer vs. United States, 102 U. S. 586, 594 (1881).

Petitioner claims in his brief (page 27) that he was *denied* a hearing because of the requirements of payment contained in the attacked statute, with which he did not comply. Thus it is asking this Court to find, in effect, that a failure by a taxpayer, seeking to appeal his tax, to comply with the conditions precedent to such appeal, is tantamount to an absolute omission in the tax laws of provisions for an opportunity to be heard on the tax. There is no deprivation of constitutional rights by the setting of a condition precedent to a hearing when that condition is the filing of a bond by the taxpayer.

McMillen vs. Anderson, 95 U. S. 37 (1877).
Phillips vs. Commissioner of Internal Revenue, 283 U. S. 589 (1931).
Nickey vs. Mississippi, 292 U. S. 393 (1934).

Can it be then, that the fact that the condition precedent being the payment of the tax makes the statute unconstitutional? Payment of the tax is certainly a condition precedent, as it were, to an action to recover back an illegal tax. And this court, as shown above, has upheld that remedy as adequate protection to the taxpayer.

The petitioner further objects to the instant statute because it is one in which the requirement as to payment is

affirmatively provided therein. Wherefore lies the distinction between such tax laws, containing refund provisions, which affirmatively require the payment of the tax before hearing, and tax laws which effectually require the same? In either case the taxpayer is afforded opportunity for hearing before the tax is finally established against him and therein lies the fulfillment of the guarantees of the 14th amendment.

McGregor vs. Hogan, 236 U. S. 234, 237 (1923).

It will be noted that the statute in the instant case provides for refund, *with interest*, to the taxpayer of the amount of over-assessment, if any. It is provided in Section 1 of the said statute as follows:

> "If upon hearing it appears that the complainant has complied with all applicable provisions of law and the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require."

Thus, even if he paid all the tax as assessed, before the appeal was entered in the Appellate Tax Board, the petitioner was afforded full benefit of the ultimate determination of the amount of the tax.

Respondent submits that there can be no tenable distinction between legislation setting the condition of payment of a tax prior to hearing thereon, that condition being affirmatively expressed in the statute, and legislation containing the affirmatively expressed condition as to the posting of a bond. Neither can there be a tenable distinc-

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tion between the necessity of prepayment such as required by the instant statute and the necessarily same obligation precedent to a suit for recovery of a tax.

The constitutionality of legislation analogous to Massachusetts Statute 1938, c. 478, requiring payment of the tax as a condition precedent to hearing on its validity or amount has been upheld in other jurisdictions. Cooley on Taxation, 4th Ed., Sec. 143. In *Morrison-Knudson Co., Inc. vs. State Board of Equalization of Wyoming*, 35 Fed. Supp. 553, we find a significant statement by the Court, at p. 556:

> "The principle of law involved seems to be the question of constitutional due process. Here, a hearing is afforded only in the event the taxpayer pays the tax, which in itself is not unusual or unconstitutional * * *."

In that case the Court found the Wyoming legislation unconstitutional for reasons not applicable to the Act involved in the case at bar.

For decisions of state courts upholding the provisions of prepayment akin to the Massachusetts provisions, the attention of this Court is respectfully directed to the following:

Richford Savings Bank & Trust Co. vs Thomas, 111 Vt. 393.
Exchange Oil Co. vs. State, 80 Okla. 52.
Eddy vs. Township of Lee, 73 Mich. 123.

And for the same or similar effect, to the following:

Powell vs. Gleason, 50 Ariz. 542.
Fleming vs. Power, 77 S. C. 528.
Zimmerman vs. Corson County, 39 S. D. 167.
Fort vs. Dixie Oil Co., 170 Tenn. 183.
Wisconsin Real Estate Co. vs. Milwaukee, 151 Wis. 198.
Casco vs. Thurston County, 163 Wash. 666.
Ballard vs. Wooster, 182 Wash. 408.

The comprehensive and well considered opinions by Ronan J. in *Old Colony Railroad vs. Assessors of Boston*, 309 Mass. 439 and *Lincoln Hotel Company vs. Assessors of Boston*, 317 Mass. 505 will afford this Court an exhaustive study of the question here involved.

The taxes of the appellant in the case at bar were, at the time of its appeals to the Appellate Tax Board, presently due and payable, and it was the duty of those in charge of its affairs to pay them. It could hardly be said that the appellant had any constitutional right not to pay the taxes. Nor did it have a right to a final determination of the amount of the taxes before being required to pay them. Therefore, St. 1938, c. 478, by making the payment of all or part of each tax (in certain instances) a condition precedent to the obtaining of a review by that Board, did not deprive the appellant of any constitutional right.

In view of the various cases hereinbefore cited, which, we submit, have established the constitutional right of a state legislature to require a person assessed to pay a tax before litigating its legality or amount, we respectfully urge that St. 1938, c. 478, presents no substantial Federal question.

Furthermore, it is established that one who assails a statute as unconstitutional must show that he is injuriously affected thereby.

> *Mallinckrodt Works vs. St. Louis*, 238 U. S. 41.
> *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531, 544.

The decision of the Land Court held that the petitioner was not unable to comply with the provisions of the statute as to payment. That decision read in part as follows:

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"Thus the evidence which was introduced tending to prove that Marden & Murphy, Inc. was unable to comply with the provisions of St. 1938, c. 478, s. 3 as to payment is immaterial. If it should be material, however, it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment. Exhibits 89 and 90 are statements of condition of Marden & Murphy, Inc. for various months in 1938, 1939 and 1940. An examination of these statements discloses that from the cash on hand alone, without considering the other assets of the corporation, the provisions of the statute in regard to payment as to parcels 2 and 3 could have been complied with, and that from the other assets of the corporation arrangements might have been made to secure the necessary money to comply with the provisions of the statute in regard to payment as to parcel 1" (R., pp. 29, 30).

Under the circumstances, we suggest, the appellant has not shown that it has been injuriously affected by the conditions as to payment imposed by St. 1938, c. 478.

2. The Petition Should Not Be Granted as to Questions (b) and (c) Involving the Opportunities Afforded a Taxpayer to Contest His Tax.

Petitioner questions the right of Massachusetts to regulate the manner in which a tax shall be contested as to overassessment, and couples the ruling of the Massachusetts Courts in the instant case that proceedings for abatement are the only remedy available; to the necessity for payment of the tax before abatement proceedings can be had. In his brief (Page 30) petitioner refers this Court to the authorities and arguments set out in the preceding division of his brief.

As to the cases cited to the effect that the taxpayer has a right to a hearing before the tax levied upon him becomes

established the respondent has no quarrel with that general principle which they support. However, petitioner further claims that the taxpayer is entitled to have questions of law passed on by a judicial tribunal, and to support this, cites *Ohio Valley Water Company vs. Ben Avon Borough*, 253 U. S. 287 and *Wadley Southern Railway vs. Georgia*, 235 U. S. 651.

In the *Ohio Valley Water Co.* case, which was a utility rate case, this Court said:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to other law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The case at bar concerns the ordinary annual tax upon real estate, not the rates of a utility company. When this class of taxes has been involved, the proceedings have been construed with the utmost liberality and have been held to violate the Fourteenth Amendment only where they are arbitrary, oppressive or unjust.

> *Glidden vs. Harrington*, 189 U. S. 255, 258.
> *Missouri Pacific Railroad Co. vs. Western Crawford Road Improvement District*, 266 U. S. 187.

The *Wadley* case involved the regulation of carriers and is likewise outside the scope of the principles of law relating to taxation. Due process of law does not require a judicial hearing on a tax. A hearing before an administrative body is sufficient.

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Palmer vs. McMahon, 133 U. S. 660. (1890)
Pittsburg etc. Railway vs. Backus, 154 U. S. 421. (1894)
De Pauw University vs. Brunk, 285 U. S. 527, affirming 53 F. 2nd 647 (1932)

In support of his statement that having claimed a violation of constitutional rights, he is entitled to a review of both law and facts by some tribunal other than the board which levied the assessment, the petitioner cites *Chicago, Burlington and Quincy Railroad vs. Osborne*, 265 U. S. 14 and *Londoner vs. Denver*, 210 U. S. 373. The *Osborne* case was distinguished by the respondent herein in the proceedings on appeal in this case, (Statement Opposing Jurisdiction, pp. 7-8) and will not be dwelt on further here except to point out that the question presented in that case is not analogous to that in the case at bar.

Londoner vs. Denver does not militate against the situation presented in the instant case. In that case the taxpayer was afforded only the right to submit his objections to the tax in writing and had no opportunity whatever "to support his allegations by argument however brief, and, if need be, by proof, however informal." (p. 386.) It will be noted that in that case the taxpayer's only resort was to the board of equalization and that board provided *no method of hearing whatever* other than the said written submission of his objections. In the instant case opportunity for a full and ample hearing was afforded the taxpayer.

The assessment of water power to the petitioner was established by the Land Court as, at most, an overvaluation of his premises (R. p. 26). It was found that water power was not separately assessed but was assessed merely as an

enhancement of the value of petitioner's land. This reduction by the court of a claimed invalidity in the assessment, to a matter of possible overvaluation was purely a matter of local law. The finding by the Land Court and the Supreme Judicial Court that the petitioner's exclusive remedy therefor was by abatement proceedings raised no Federal question.

Northern Pacific Railroad Company vs. Patterson, 154 U. S. 130. (1894).
Mellon Company vs. McCafferty, 239 U. S. 134 (1915)

Thus the record in this case at bar is ample evidence that *invalidities* in the assessments may be raised, under Massachusetts law, by a taxpayer in resistance to the foreclosure of a tax lien and, consequently, when the petitioner claims that under the said Massachusetts law his only remedy for invalid assessments lay in abatement proceedings, he is including *invalidities* under the local rule which in fact applies only to *overvaluation*. While invalidities in an assessment may be raised in abatement proceedings, that remedy is not exclusive. Petitioner shows recognition of this fact in his argument in his brief (Page 38) and yet his statement of questions presented (Petition p. 13), questions (b) and (c) refer to "validity or amount" of the assessments.

When petitioner says that he was *denied* a hearing as to the amount of the assessments he is of course assuming that he was entitled to a hearing before the Appellate Tax Board without complying with the conditions required by the statute regulating such appeals. That he was not so entitled, the respondent respectfully submits.

Not having prosecuted his appeal as to the taxes for the years 1938 and 1939, the petitioner has not pursued the

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remedies provided him before the board established by the laws of Massachusetts for that purpose. That he was obliged to pursue those remedies is well established. It was said by this Court in *First National Bank vs. Weld*, 264 U. S. 450 (1924) at 453:

> "We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of the opinion that this contention must be upheld."

3. The Petition Should Not be Granted as to Questions (d) and (e) Involving the Assessment of Petitioner's Property.

In approaching the question of the alleged discrimination by the Assessors of Lowell in their valuation of petitioner's land, the Court's attention is respectfully directed to the decision of the Land Court, in that part thereof where the evidence on this point is reviewed. It reads as follows, (R. p. 24):

> "The evidence discloses that in the City of Lowell land without water power is assessed at a certain value; that when land is with water power, a value is added to said land; that twenty cents a square foot was added to the value of the land of Marden & Murphy, Inc. before the above-mentioned conveyance to the Hamilton Company, and the same amount was added to the value of both the land of Marden & Murphy, Inc. and the Hamilton Company after said conveyance; that the land in question was assessed at this figure despite the fact that the Board of Assessors knew of the conveyance to the Hamilton Company by which Marden & Murphy, Inc. had conveyed its water power, *among other reasons because there was still a water wheel in the Mill No. 7 building, and because by a decision of the Board of Tax Appeals made in 1931 involving Marden & Murphy, Inc. and the land in ques-*

> *tion in this case and other land, the value for said land was established at about seventy-five cents a square foot and there was a finding in said decision that water power added nothing to the land.*" (Italics supplied.)

Before commenting on the significance of that part of the above excerpt which petitioner has emphasized, it might be well to point out that where the Court said: "and the same amount was added to the value of both the land of Marden & Murphy, Inc. and the Hamilton Company after said conveyance * * *" it was the Court's way of saying that the valuation remained unchanged. This is amply borne out by the record and by petitioner's brief (p. 31) and is mentioned here simply to avoid the possible implication that there was any *additional* valuation assessed following the conveyance. No other inference is intended to be drawn here by the respondent.

The petitioner says in his brief, (p. 31):

> "Here the Assessors did not in any true sense make an assessment or valuation of petitioner's land. What they called their 'assessed value' in this case is made up of (a) their estimate of the value of petitioner's land plus (b) a further amount representing what they deemed to be the value of another asset which they were fully aware belonged wholly to someone else."

Respondent submits that the above, which is the basis for petitioner's claim of discrimination," is not borne out by the record. It implies that the Assessors included in the assessment to the petitioner something which they knew that they had *no right* to assess to him and that by that inclusion, they arrived at a figure for the square foot value of the land which was in excess of their valuation of the land without the inclusion. That this implication is faulty in two counts is evidenced by the portion of the

Land Court decision above quoted. First because of the presence of the water wheel in the building located on Parcel 1, which wheel was usable at all times, the petitioner being the owner of the fee in the land and building. (R. p. 25) This was one of the reasons disclosed by the evidence why the assessors placed upon the land the valuation that they did. If the continued presence of the water wheel, whether used or not, (petitioner does not claim it was not) justified the assessors under local law in continuing their assessment of Parcel 1 as land "with water power", then the petitioner has no cause for complaint here. The Land Court did not pass upon this point. It will be noted that only in the case of Parcel 1 does the assessors' valuation list mention water power. (R. pp. 17-19) The claim of the petitioner that it was likewise assessed for water power in Parcel 2 rests fundamentally upon implication from the fact that the assessed value of the land comprising Parcel 2 was the same before and after the conveyance to the Hamilton Company. The second count is that there was evidence that the assessors relied upon a decision of the Board of Tax Appeals made in 1931 which placed the value of the land in question in this case at about seventy-five cents a square foot and included a finding that water power added nothing to the value of the land. (R. Evid. pp. 120, 129-130).

By whatever method the assessors arrived at the figure of twenty cents per foot as the value of water power when it made its assessment on the mill site prior to the conveyance to the Hamilton Company of the water power and part of the land, it is not without reason that the finding of the board charged with review of such assessments, to the effect that water power added nothing to the value of the land, influenced the assessors in maintaining the same per

foot valuation after that conveyance both as to the land remaining to the petitioner and as to the land conveyed to the Hamilton Company. It is significant that neither the Land Court nor the Supreme Judicial Court has held that there was a *wrongful* inclusion of water power in the assessment following the said conveyance.

Thus we find that after the conveyance no mention was made of water power in the valuation list of the Assessors as to Parcel 2, while in the case of Parcel 1, it being the site of the building containing the water wheel and likewise the location of a considerable length of the raceways and wasteways going to make up the entire water power system, the assessment list continued to carry the words "with water power".

Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principles of uniformity.

Rowley vs. Chicago & Northwestern Railway Company, 293 U. S. 102, 111 (1934).

Respondent submits that there is no evidence of discrimination shown by the petitioner.

Conclusion.

For the various reasons set forth above, it is submitted that the petition for a writ of certiorari should be denied with costs to the respondent.

Respectfully submitted,

P. HAROLD READY,
RAYMOND D. O'BRIEN,
Attorneys for Respondent.

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